



Mitchell E. Daniels, Jr.
Governor

Judith A. Monroe, M.D.
State Health Commissioner

Indiana State
Department of Health
An Equal Opportunity Employer

May 8, 2006

Phil Sachtleben
Executive Director
Legislative Services Agency
Statehouse, 200 West Washington Street
Indianapolis, Indiana 46204

Re: Senate Enrolled Act 293 (2005)

Dear Mr. Sachtleben,

Attached you will find a determination letter from the Secretary of the United States Department of Health and Human Services (HHS). SEA 293 required the State Department of Health to request this letter from HHS. Please let me know if you have any questions.

Sincerely,

Sue Uhl
Deputy Commissioner
(317) 233-7200

Attachment



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

JAN 10 2006

Director
Office for Civil Rights
Washington, D.C. 20201

Ms. Sue Uhl
Deputy State Health Commissioner
Indiana State Department of Health
2 North Meridian Street
Indianapolis, Indiana 46204

Dear Deputy Commissioner Uhl:

RE: Request for HIPAA Privacy Rule Exception Determination

This letter responds to your May 27, 2005, letter to the Secretary requesting that the Department except a provision of Indiana law, Section 2 of Indiana Code (IC) 16-39-10, from preemption by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 C.F.R. Part 160 and Part 164, Subparts A and E. The Secretary has delegated his authority to make such exception determinations under 45 C.F.R. § 160.203(a) to the Director of the Office for Civil Rights.

Conclusion

We have determined that Section 2 of IC 16-39-10 is not "contrary" to the Privacy Rule provisions at 45 C.F.R. §§ 164.502(a) or 164.512(f)(2) and, thus, is not preempted by these provisions. Indiana covered entities can comply with the Indiana statute while also complying with the Privacy Rule requirements, and the Indiana statute does not stand as an obstacle to the accomplishment of the objectives of the HIPAA statute. Therefore, there is no occasion to consider whether to grant an exception pursuant to 45 C.F.R. § 160.203(a).

Relevant law

Preemption under HIPAA

The Privacy Rule is one of the regulations mandated by Title II, Subtitle F, Section 261-264 of HIPAA, Public Law 104-191, titled "Administrative Simplification." The general preemption rule under the HIPAA Administrative Simplification Rules is that "[a] standard, requirement, or implementation specification adopted under [the Administrative Simplification Rules] that is contrary to a provision of State law preempts the provision of State law." 45 C.F.R. § 160.203. This regulation reflects the statutory provision at § 1178(a) of the Social Security Act (42 U.S.C. § 1320d-7(a)).

The HIPAA Administrative Simplification Rules define “contrary” at § 160.202, as follows:

Contrary, when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means: (1) A covered entity would find it impossible to comply with both the State and federal requirements; or (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the [Social Security] Act or section 264 of Pub. L. 104-191, as applicable.

Thus, there is both (1) an “impossibility test” and (2) an “obstacle test” in determining whether a provision of State law is “contrary” to a provision of the HIPAA Administrative Simplification Rules, including the Privacy Rule. As described above, the “impossibility test” looks to whether a covered entity would find it impossible to comply with both the State law and the Privacy Rule. The “obstacle test” references Part C of title XI of the Social Security Act, which refers to the Administrative Simplification provisions of HIPAA. The purposes of the Administrative Simplification provisions of HIPAA are to improve the Medicare and Medicaid programs, and “the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information.” Section 261 of P.L. 104-191.

The “obstacle test” also references section 264 of HIPAA. The purpose of section 264 is to protect the privacy of individually identifiable health information by providing for the establishment of standards with respect to the rights of an individual who is a subject of individually identifiable health information, the procedures that should be established for the exercise of such rights, and the authorized and required uses and disclosures of such information.

If the applicable Privacy Rule provision is “contrary” to a State law provision, either under the impossibility test or the obstacle test, the State law would be preempted, and the Department can then consider whether an exception to such preemption should be granted. Conversely, if the Privacy Rule and the State law provisions are not contrary, the Privacy Rule provision does not preempt the State law provision and the question of whether an exception should be granted does not arise. Thus, the State law must be “contrary” in order for the Department to consider a request for an exception determination. See 45 C.F.R. § 160.203.

Disclosure of protected health information under the HIPAA Privacy Rule

The Privacy Rule’s general rule regarding the disclosure of protected health information,



at 45 C.F.R. § 164.502(a), states:

A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

Section 164.512(f)(2) of the Privacy Rule permits the disclosure of protected health information to identify or locate a missing person as follows:

Permitted disclosures: limited information for identification and location purposes.

Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

(i) The covered entity may disclose only the following information: (A) Name and address; (B) Date and place of birth; (C) Social security number; (D) ABO blood type and rh factor; (E) Type of injury; (F) Date and time of treatment; (G) Date and time of death, if applicable; and (H) A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

(ii) Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual's DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.

Indiana law

In April 2005, the Indiana legislature passed P.L. 47-2005, which states:

SECTION 1. IC 16-39-10 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]:

Chapter 10. Disclosure of Protected Health Information

Sec. 1. As used in this chapter, "covered entity" has the meaning set forth in 45 CFR 160.103 as in effect on November 4, 2004.

Sec. 2. As used in this chapter, "law enforcement official" has the meaning set forth in 45 CFR 164.501 as in effect on November 4, 2004.



Sec. 3. As used in this chapter, "protected health information" has the meaning set forth in 45 CFR 160.103 as in effect on November 4, 2004.

Sec. 4. A covered entity may disclose the following protected health information to a law enforcement official who requests the protected health information for the purpose of identifying or locating a missing person:

- (1) Contact information, including family, personal representative, and friends of the individual.
- (2) Previous addresses of the individual and the individual's family, personal representative, and friends.

SECTION 2. [EFFECTIVE JULY 1, 2005] (a) The state department of health shall, not later than September 1, 2005, request that the Secretary of the United States Department of Health and Human Services make a determination under 45 CFR 160.204 that IC 16-39-10, as added by this act, is not preempted by 45 CFR 164 because an intrusion into privacy that may result from implementing this chapter is warranted when balanced against a compelling state interest, including a public health, safety, or welfare need to identify or locate a missing person.

(b) Upon receiving a determination from the Secretary concerning a request made under subsection (a), the state department of health shall:

- (1) publish the determination on the state department's Internet web site; and (2) forward the results of the determination to: (A) the licensing authority for each covered entity; (B) each law enforcement agency in Indiana; and (C) the executive director of the legislative services agency.

(c) This SECTION expires December 31, 2008.

The regulations cited in Sections 1, 2 and 3 above (i.e., 45 CFR 160.103, 45 CFR 164.501 and 45 CFR 160.103 respectively) are regulations in the HIPAA Privacy Rule.

Request for exception determination

The May 27, 2005, letter from the Indiana State Department of Health states that an exception is requested in regard to 45 C.F.R. § 164.512(f)(2). The letter indicates that a covered entity that is seeking to assist a law enforcement agency in contacting a missing person, or in contacting individuals who may have knowledge of the whereabouts of a missing person, will



Page 5 - Ms. Sue Uhl

likely want to share valuable contact information not listed in § 164.512(f)(2) of the Privacy Rule. According to the letter, this may include “home, work or mobile telephone numbers; e-mail addresses; fax numbers; and Internet Protocol (IP) numbers.” The May 27, 2005, letter argues that permitting the disclosure of this other “contact-related PHI [protected health information] will help fulfill the public policy goals of the regulation to support not only the identification of individuals, such as missing persons, but also to support the prompt contacting and locating of such individuals.”

The State law that required the Indiana State Department of Health to request an exception determination provided that the Indiana law “is not preempted by 45 CFR 164 because an intrusion into privacy that may result from implementing this chapter is warranted when balanced against a compelling state interest, including a public health, safety, or welfare need to identify or locate a missing person.”

The May 27, 2005, letter did not address whether the Indiana law is “contrary” to any provision in the Privacy Rule.

Analysis and conclusions

As indicated above, the Department may make an exception determination only if the provision of the identified state law is “contrary” to a provision in the Privacy Rule. The relevant Privacy Rule provisions are § 164.502(a), which prohibits a covered entity from disclosing protected health information except as otherwise permitted or required by the Privacy Rule, and § 164.512(f)(2), which permits the disclosure of certain limited information to identify or locate a missing person. While the Indiana statute does not define “contact information,” the May 27, 2005, letter indicates that the term “contact information” includes not only addresses, but telephone numbers, facsimile numbers, and Internet Protocol (IP) numbers. Telephone, facsimile, and IP numbers may not be disclosed under § 164.512(f)(2) of the Privacy Rule. There also may be other information considered “contact information” under the Indiana law that is not on the list contained in § 164.512(f)(2) of the Privacy Rule. Thus, the Privacy Rule would not permit the disclosure of some information that Indiana law permits to be disclosed for the purpose of identifying or locating a missing person.

We conclude that a state law that permits, but does not require, a disclosure of protected health information that is not permitted by the Privacy Rule is not “contrary” to the Privacy Rule. In applying the “impossibility test” in the definition of “contrary,” we look at whether a covered entity would find it impossible to comply with both the Indiana statute and the Privacy Rule’s disclosure provisions. We conclude that it is possible for a covered entity to comply with both the provisions of the Indiana law and the provisions of the Privacy Rule. This can be



Page 6 - Ms. Sue Uhl

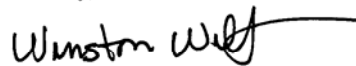
accomplished by the covered entity limiting its disclosure of contact information to names and addresses and other information permitted to be disclosed under § 164.512(f)(2) of the Privacy Rule when responding to a law enforcement request for information to identify or locate a missing person. Therefore, Indiana law, Section 2 of IC 16-39-10, is not contrary to either 45 C.F.R. §§ 164.502(a) or 164.512(f)(2) under the "impossibility test."

We also conclude that the Indiana statute is not an obstacle to improving Medicare, Medicaid or the efficiency and effectiveness of the health care system. We do not believe the Indiana statute, which permits the disclosure of a limited amount of information to a select category of individuals for a very specific public interest (i.e., to locate a missing person), serves as an obstacle to the achievement of these purposes. Furthermore, a permissive State law does not present any obstacle to covered entities fully complying with the Privacy Rule and, thus, does not stand in the way of accomplishing the purposes of section 264 of HIPAA. The Indiana law, Section 2 of IC 16-39-10, need not be preempted (i.e., does not need to be superseded) for the Privacy Rule provisions, §§ 164.502(a) and 164.512(f)(2), to fully operate.

In that the Indiana law and the Privacy Rule are not "contrary," the Privacy Rule disclosure provisions do not preempt the Indiana provisions and, thus, the request for an exception determination cannot be considered. The May 27, 2005, letter argued that permitting the disclosure of additional identifiable information would support the policy goal of identifying, contacting and locating missing persons and the State law provided that this intrusion into privacy is warranted when balanced against the compelling public health, safety, or welfare need. While these arguments may be relevant in determining whether to grant an exception determination, they are not relevant in determining whether the laws in issue are "contrary" and, thus, cannot be considered here.

For further information regarding the process and standards applicable to exception determinations, and for extensive information about the Privacy Rule itself, please visit our website at <http://www.hhs.gov/ocr/hipaa/>. Please contact me if you have any questions.

Sincerely,



Winston Wilkinson, J.D.

Director

Office for Civil Rights

